United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Brief

ORIGINAL
WITH PROOF
OF SERVICE

74-1927

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

SIDNEY DANIELSON, Regional Director of the National Labor Relations Board, Region 2, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 501, AFL-CIO,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

PRELIMINARY STATEMENT

The General Counsel National Labor Relations Board now comes to the Second Circuit to try to find support for its rejected per se right of control theory and approach.

The General Counsel's theory and approach, as exemplified in this case, is to ignore the surrounding

circumstances and to concentrate on the single element of the employer's ability to control.

The General Counsel's theory and approach have been rejected by the Supreme Court of the United States. National Woodwork Manufacturers Assn. v. NLRB, 386 U.S. 612 (1967).

The General Counsel's theory and approach have been rejected by the United States Court of Appeals for the First Circuit. Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188 (CA 1, 1969).

The General Counsel's theory and approach have been rejected by the United States Court of Appeals for the Third Circuit. NLRB v. Local Union No. 164, IBEW, 388 F.2d 105 (CA 3, 1968).

On the facts of this case it appears that the United States Court of Appeals for the Fourth Circuit also disapproved of the theory and approach of the General Counsel in this case. See George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (CA 4, 1973).

The General Counsel's theory and approach have been rejected by the United States Court of Appeals for the Eighth Circuit. American Boiler Manufacturers Assn v. NLRB, 404 F.2d 556 (CA 8, 1968).

The General Counsel's theory and approach have been rejected by the United States Court of Appeals for the Ninth Circuit. Western Monolithics Concrete Products v. NLRB, 446 F.2d 552 (CA 9, 1971).

The General Counsel's theory and approach have been rejected by the United States Court of Appeals for the District of Columbia. Carpenters, Local 742 v. NLRB, 444 F.2d 895 (D.C. Cir., 1971), cert. den. sub nom. J.L. Simmons Co. v. Local 742, Carpenters, 404 U.S. 986 (1971); United Ass'n of Journeymen, etc. v. NLRB, 430 F.2d 906 (D.C. Cir. 1970).

The General Counsel's theory and approach have been questioned and disapproved by the United States District Court for the Sourthern District of New York. Danielson, etc. v. Painters District Council No. 20, 305 F. Supp. 1108 (SDNY, 1969).

The General Counsel's theory and approach have been rejected by the United States District Court for the District of Connecticut. And it is from that decision that this appeal has been taken.

The Administrative Law Judge of the National Labor Relations Board, after review of the record now before this

Court, as supplemented at a further hearing, has issued a decision and recommended an order dismissing the complaint in this case. A copy of that decision and recommended order is to be found at the end of this memorandum of law.

Thus, the Supreme Court of the United States and six United States Courts of Appeals have rejected the theory and approach of the National Labor Relations Board as applied to the facts of this case; and the two judges who have already ruled on this specific case have rejected the position of the General Counsel.

We also note that the buildings under construction have been completed. There is no longer anything to enjoin. Thus, this appeal can only have as its real purpose an attempt, as this stage of the proceedings, to obtain a ruling on the law as applied to the facts of this case. To seek such a ruling at this time is at variance with the scheme of the statute.

The National Labor Relations Board, before which this case is now pending on exceptions taken by the General Counsel and the charging party, has the prerogative and obligation to speak out first on the law. The United States Courts of Appeals have the jurisdiction to review

the Board's determination. In these circumstances, when no injunction can issue because there is no longer anything to enjoin, it is putting the cart before the horse to try to race into this court to obtain an expression on the law before the Board itself renders its decision.

ISSUE PRESENTED

Should an injunction issue under Section 10(1) of the National Labor Relations Act when the conduct complained of has been found to be protected by the very same Act in like cases by the Supreme Court of the United States and the United States Courts of Appeals for the First, Third, Fourth, Eighth, Ninth and District of Columbia; and, on the specific facts in this case, by the United States District Court for the District of Connecticut and by an Administrative Law Judge of the National Labor Relations Board who has recommended that the Regional Director's complaint be dismissed in its entirety?

COUNTER-STATEMENT OF FACTS

The facts in this case are not in dispute. The Union did not even call a witness in the District Court proceeding. There is no contradictory evidence in the record. But there is now a difference. There are the facts as they appear in the record, as they have been found by United States District Court, and as they have been found by the Administrative Law Judge of the National Labor Relations Board. A different version has been presented to this Court in the brief of the General Counsel. It is noted that the General Counsel has not raised the issue that the findings of fact of the Court from which this appeal is taken are not supported by substantial evidence. The facts as they appear in the record and as they were found by the District Court, insofar as they were omitted or differ from those presented to this Court in the brief of the General Counsel, are as follows.

The General Counsel writes that the District Court "conceded that under applicable Board law, the Union's threats and strike conduct were unlawful." (G.C. brief, p. 11) The District Court made no such statement and the Administrative Law Judge, who incidentally was a

former General Counsel to the National Labor Relations Board, specifically held that the Union's conduct in this case did not violate applicable Board law. (ALJ, p.8) 1/ Moreover, at the time of the writing of his brief the General Counsel was well aware that there was no "strike conduct" by local No. 501. Indeed the evidence on this point was so clear and convincing that the General Counsel himself moved to withdraw that part of the charge which rested on alleged Union strike conduct. (ALJ p.1-2 ftnt. 1)

But Local No. 501 did threaten to exercise its rights under Article II, Section 1a of its collective bargaining agreement. (A 116-117) That provision gives Local No. 501 an explicit right to strike. It reads in material part:

> "Members of the Union shall not work for any employers except those who comply with the working rules later stated in this agreement."

The employer parties to the collective bargaining agreement were Peter M. Santella, Inc. (Santella) and

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1/ Refers to decision and recommended order of Administrative Law Judge in this case printed at the back of this memorandum. Page references are to the actual pages in the decision itself.

Rice Electrical Contracting Co. (Rice). They deliberately and intentionally breached their agreements with the Union by negotiating contracts with Atlas Construction Co., Inc. (Atlas), which were in violation of Rule 27c of their collective bargaining agreements. (A 122, ALJ p. 8)

The Court below wrote:

> "Since this case is devoid of surrounding circumstances that would justify a conclusion of secondary activity, an unfair labor practice could be found only be a per se application of the Board's 'right of control' test. It may be that this approach is more plausible where the employer did not participate in negotiating the sub-contract that is alleged to violate his agreement with the union, see George Koch Sons. Inc. v. NLRB, _____ F.2d _____ (4th Cir. Dec. 14, 1973). But when an employer is subjected to coercive pressure after he has negotiated the contract that places him in violation of his own agreement with a union, that pressure, in the absence of activity directed at third parties, is primary within the meaning of § 8(b)(4)(B)." (A 122)

The Administrative Law Judge who heard this case wrote:

> "The record here demonstrates that Atlas had full authority to grant all or part of the electrical work at both sites and Santella and Rice had full bargaining power with respect to that work. Under the circumstances it is plain that Santella and Rice, in effect, voluntarily surrendered their right to control when they negotiated away the work which they had earlier agreed in their collective bargaining agreement to preserve for their employees. Respondent's statement that it would withhold the services of the employees of Santella and Rice, because

of their voluntary abandonment of their contractual commitment to Respondent, was a further exercise of a contractual commitment not to work where there was a violation by the employer party to the agreement of an established working rule.

* * *

"Here Santella and Rice had the potential for control. By their voluntary action they forfeited that potential. Significant here, as the Board holds, is not only the situation Santella and Rice as pressured employers found themselves in but how they came to be in that situation. The surrounding circumstances here, unlike those in Koch, would justify a finding of a proscribed secondary boycott only by a naked and mechanical application of the 'right to control' the work doctrine." (ALJ 8)

The record also belies the General Counsel's attempt to convince this Court that it should construe Rule 27c of the collective bargaining agreement (A 117) so as not to apply to the facts of this case. Such attempt is not only thwarted by the direct language of Rule 27c, but also by all the evidence as to the meaning of Rule 27c as understood by the parties to the collective bargaining agreement. (A 50-51) There is not a scintilla of evidence to support the General Counsel's argument that this Court should reject the parties own understanding of their own agreement.

The General Counsel repeatedly asserts that "Santella and Rice, as a practical matter, could respond

to the Union's pressure only be rescinding their subcontracts with Atlas" (G.C. brief p. 21) and that "they at all times lacked the power to resolve the Union's dispute except by giving up their subcontracts" (G.C. brief pp. 25 and 27). This is directly contradicted by the record. At the time of the Court hearing and at all times thereafter, including at the time of the hearing before the Administrative Law Judge of the National Labor Relations Board, both Santella and Rice had resolved their labor disputes with the Union and their employees were working on the jobs in question. The resolution of the labor disputes was compliance by Santella and Rice with the ruling of the Joint Labor-Management Committee (A 50-51) made in accordance with the provisions of the collective bargaining agreement. (A 116) The resolution of the labor dispute did not, in fact, require that Santella and Rice rescind their contracts to do the work on the job sites. (A 122)

Finally, the General Counsel repeatedly asserts that the Union's dispute was with Atlas. (e.g. G.C. brief, p.18, 21) No record reference is cited to support that assertion. The record refutes it. At all times Local No. 501 asked only that Santella and Rice live up to their collective bargaining agreement obligations.

When they did so to the extent directed by the Joint Labor Management Committee the dispute was at an end.

At no time did Local No. 501 ask any employer to cease doing business with any other employer. At no time did Local No. 501 ask the employees of any other employer to strike or to refrain from handling the product of any other employer. The record is silent; completely devoid of any evidence of any secondary conduct or activity. There is no "surrounding circumstance". (A 122) This is a classic case of the per se application of the right of control theory.

POINT I

The Role of this Court on the Appeal by The General Counsel from the Denial of a Petition for an Injunction Under Section 10(1) of the National Labor Relations Act.

This Court recently explored in depth its role on the review of a District Court's disposition of a petition for an injunction under section 10(1) of the National Labor Relations Act. Danielson, etc. v. Joint Board of Coat, Suit and Allied Garment Workers Union, 494 F.2d 1230 (CA 2, 1974). There is nothing in this case which warrants the re-examination of the position of this Court on this issue as so recently stated.

Indeed, the facts of this case reinforce the propriety of that decision which holds that when "the district court is convinced that the General Counsel's legal position is wrong ... it should not issue an injunction under § 10(1)." 494 F.2d at p. 1245

In this case we do not have a novel theory presented by the General Counsel; we have a repeatedly rejected theory. The per se application of the right of control theory has been rejected by the Supreme Court of the United States, by the six United States Courts of

Appeals which have had the opportunity to consider the issue since the Supreme Court spoke, and by District Courts in this Circuit. See National Woodwork Manufacturers Assn. v. NLRB, 386 U.S. 612 (1967); Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188 (CA 1, 1969); NLRB v. Local Union No. 164, IBEW, 388 F.2d 105 (CA 3, 1968); George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (CA 4, 1973); American Boiler Manufacturers Assn. v. NLRB, Western Monolithics Concrete Products v. NLRB, 446 F.2d 552 (CA 9, (1971); Carpenters, Local 742 v. NLRB, 444 F.2d 895 (D.C. Cir., 1971), cert. den. sub nom. J.L. Simmons Co. v. Local 742, Carpenters, 404 U.S. 986 (1971); United Ass'n of Journeymen, etc. v. NLRB, 430 F.2d 906 (D.C. Cir. 1970); Danielson, etc. Painters District Council No. 20, 305 F. Supp. 108 (SDNY, 1969).

On the facts of this case this Court clearly should affirm. The Union is engaging in activity which has repeatedly been found by numerous courts to be protected, not prohibited, by the National Labor Relations Act. This Union has a right to rely on those numerous statements of the Law. It has carefully conducted itself so as to fall within the repeatedly approved and protected ambit of lawful activity.

POINT II

The General Counsel's Theory Is Wrong.
The District Court's Decision Is Correct.
Its Denial of the Petition for an
Injunction Should be Affirmed.

A. Preliminary Argument.

We have here a very simple case.

The collective bargaining agreement contains a valid work preservation clause. (A 117)

The employer parties to that agreement (Santella and Rice) violated that clause.

The Union, pursuant to another specific provision of the collective bargaining agreement (A 116-117) threatened to withdraw the employees of Santella and Rice from those jobs on which they were violating the collective bargaining agreement.

Pursuant to still a third provision of the collective bargaining agreement (A 116) a Joint Labor-Management Committee ruled that Santella was in violation of his agreement with the Union. He was directed to provide the work which was preserved by the agreement.

When Santella and Rice, the employers of the employees represented by the Union (the primary employers), agreed to abide by the ruling of the Joint Labor-Management Committee, the dispute terminated.

B. The Right of Control Theory and the Law.

The General Counsel argues in his brief that the courts have misunderstood and misapplied the law. What his brief shows, however, is that he has adamantly refused to be instructed by the courts as to the proper, limited place of the single fact of right of control in determining whether a union has engaged in a secondary boycott in violation of the National Labor Relations Act.

General Counsel argues that "the control doctrine is essentially no more than an application of the principles laid down by the Supreme Court in N.L.R.B. v. Denver Building & Construction Trades Council, [341 U.S. 675 (1951)] and in Local 1976, United Brotherhood of Carpenters v. N.L.R.B.," (the Sand Door case, 357 U.S. 93 (1958)) (G.C. brief, page 27). General Counsel also relies on N.L.R.B. v. Local 825, Operating Engineers (Burns & Roe, Inc.), 400 U.S. 297 (1971).

What the General Counsel has done is to isolate, out of context, quotations from these cases in order to

establish its theory that the "right to control" test has Supreme Court approval. Significantly, and contrary to the General Counsel's argument, not one of these cases support the application of a single factor, per se "right to control" test in determining whether conduct is permissible primary or prohibited secondary activity. All three cases are clearly distinguishable and that accounts for the General Counsel's lack of success in Circuit after Circuit.

The uniform theme running throughout the three cases cited by the General Counsel is that no one factor may be singled out to provide an easy test to this complex question. In none of the cases relied upon by the General Counsel did the Supreme Court attempt to or apply a single factor, per se approach. Instead, in each of the cases, the Supreme Court carefully analyzed all of the facts, the legislative history and Congressional intent before reaching its conclusion.

In Denver, the unions picketed the general contractor and other sub-contractors in order to compel the general contractor to cease doing business with the electrical sub-contractor. The unions argued that the general contractor and the sub-contractors were one employer. The Supreme Court rejected the argument.

The Denver case is basically different from the instant case. No union struck the general contractor or any sub-contractor in this case. No union threatened to strike the general contractor or any sub-contractor in this case, except for the specific sub-contractor who employed the employees represented by Local No. 501 - namely, the primary employer. In Denver, the electrical sub-contractor, who was the only sub-contractor who was not struck, was a non-union contractor. All the unions on the job wanted the general contractor to stop doing business with the non-union contractor. The electrical union wanted its own members on the job in place of non-union employees. In the instant case the electrical sub-contractors were union contractors. Local No. 501 members were already employed on the job. The Union, Local No. 501, did not want its own members or their employers off the jobs; Local No. 501 wanted only that its collective bargaining agreement be complied with. Thus, it is clear that the Denver case is fundamentally inapplicable to the instant case.

Likewise, Sand Door is basically different from the instant case. Thus, in Sand Door the explicit purpose and direction of union compulsion and of the collective bargaining provision which the union sought to enforce,

was the requirement that one business refuse to do business with another. The enforcement of that provision by compulsion was found to be a direct violation of public policy as expressed in the secondary boycott provisions of the Act. The contract provision in Sand Door was a hot cargo clause, not a work preservation clause. The workers in Sand Door were not interested in preserving their own work, but in the work of secondary employees working for secondary employers. A hot cargo clause does not affect the work of the employees who enforce the clause; it is secondary in effect by design and nature. A work preservation clause, on the other hand, is concerned directly with the employees involved and their own employer.

This distinction was explicitly made by the Supreme Court in National Woodwork where it recognized that a hot cargo clause is illegal while a primary work preservation clause is valid. 386 U.S. at pps. 637-640.

The conduct of Local 501 in the instant case clearly shows by what was said, by what was done, and by what eventuated, that the Union did not seek the termination of any business relationship and no termination resulted. The dispute between Local No. 501 and the employers with whom it had collective bargaining agreements was resolved

by the compliance of those employers with their agreement with the Union as directed by the Joint Labor-Management Committee.

The Supreme Court in National Woodwork wrote: "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U.S. at p. 645. By that touchstone the conduct of Local No. 501 in this case was clearly primary.

Sand Door, like Denver, is completely distinguishable from this case.

The General Counsel's reliance on N.L.R.B. v. Local 825, Operating Engineers (Burns & Roe, Inc.), 400 U.S. 297 (1971) is similarly misplaced. The facts of that case also plainly distinguish it from the instant matter now on appeal. In Burns & Roe, Inc., Local 825 had a labor dispute with a sub-contractor by the name of White Construction Company. Local 825 had no collective bargaining agreement with White. Local 825 struck the general contractor, Burns & Roe, for the purpose of requiring it to write into its agreement with White and two other sub-contractors a provision assigning the work of operating an electric welding machine to members of

Local 825. It is interesting to note that White Construction Co. was wholly and solely responsible for the actions which displeased the Operating Engineers. White's conduct was in no way attributable to an agreement it had with Burns & Roe, Inc. Moreover, Burns & Roe, the general contractor, did have the right of control; and, finally, there was no work preservation clause anywhere in the case.

The instant case is wholly different from N.L.R.B. v. Local 825, Operating Engineers (Burns & Roe). In this case Local No. 501 never struck, and it threatened to strike only the employers who were directly involved in the dispute: the electrical contractor Santella at the Stamford Dressed Beef jobsite, and the electrical contractor Rice at the Hilti jobsite. It never struck or threatened to strike any third party. It sought only to maintain its work preservation clause with its own contractors.

Thus, neither Denver, nor Sand Door, nor Burns & Roe, is a right of control case; and all are clearly distinguishable from the instant matter. The General Counsel resorts to cases which are wholly inapposite to the instant case because the right of control cases simply do not support

the theory he advanced to the District Court and he now presents to this Court.

The leading case is National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612 (1967). The Supreme Court, in National Woodwork, did not instruct the National Labor Relations Board to disregard the factor of right of control. It did direct the Board to put it in perspective and to treat it as one factor for consideration together with "all the surrounding circumstances". The Supreme Court instructed the Board to investigate "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees"; and it denominated such inquiry as "the touchstone". 386 U.S. 644-645.

The General Counsel, in the instant case, has completely disregarded National Woodwork's instructions. In a brief to this Court of 57 pages not one word is devoted to consideration of "surrounding circumstances." Not a scintilla of evidence has been presented to support the Board's argument that the labor dispute in this case was something other than exactly what it was; namely, a dispute resulting from the contracting employers' (Santella

and Rice) failure and refusal to comply with their agreements with the Union concerning their own employees.

In this case the General Counsel is applying his right of control theory as a per se doctrine despite repeated admonitions by the court that such approach is improper and that the conduct of which he complains is legal and does not violate the National Labor Relations Act.

Because the District Court and the Administrative Law Judge found that Santella and Rice actually participated in negotiations which led to their violations of their collective bargaining agreements with Local No. 501 (A 122; ALJ p.8), the General Counsel in the instant case is forced to take an even more extreme position than is usually required.

Both the District Court and the Administrative Law Judge found that the conduct of Local No. 501 was not violative of the Act even under the view of the law most favorable to the General Counsel's theory. That is, even accepting the statement of the law as advanced by the Board in Local 438, Plumbers, et al., (George Koch Sons, Inc.), 201 N.L.R.B. 59 (1973) and as determined by the Fourth Circuit in the same case, George Koch Sons, Inc. v. N.L.R.B.,

490 F.2d 323 (C.A. 4, 1973), Local No. 501 has not violated the Act.

As a consequence, the General Counsel has presented to this Court the extreme position that this Court must not only look at right of control per se, but must also limit its view to examine right of control at the very time when the Union acts. (General Counsel's brief, p.37). This extreme position is needed to distinguish numerous cases adverse to the General Counsel's position. Among such cases is that of Danielson v. Painters District Council No. 20, 305 F. Supp. 1108 (S.D.N.Y., 1969) denying a petition for a section 10(1) injunction and the decision of the Board in the same case, Painters District Council No. 20 (Uni-Coat Spray Painting, Inc.), 185 N.L.R.B. 930 (1970).

C. This Court Should Exercise Judicial Restraint and Enforce the Law As It Is Written.

The General Counsel is asking this Court to rewrite the law. Certainly there is nothing in the language of the statute which supports the theory it presents to this Court. The instant case is a classic example of primary activity. The Union threatened to withdraw the labor of the employees whom it represents from working for employers (Santella and Rice) with whom the Union has a collective

bargaining agreement for the purpose of preserving the work of its members as set forth in that collective bargaining agreement. The primary employers (Santella and Rice) breached their agreements with the Union when they negotiated and entered into contracts which failed to preserve the work of their employees. That created the labor dispute. When the primary employers (Santella and Rice) agreed to abide by the ruling of the Joint Labor-Management Committee which had the effect of preserving the work, the labor dispute was resolved.

D. The Absurd Consequences of the General Counsel's Theory.

Not even the National Labor Relations Board has been able to solve the problems raised by the right of control theory. Who, for example, is the primary employer? In the instant case the General Counsel has ducked the question completely. In Danielson etc. v. Painters District Council No. 20, 305 F. Supp. 1108 (S.D.N.Y. 1969) the General Counsel selected a manufacturer of paint headquartered in Cincinnati, Ohio as the primary employer. The employees were house painters working in Westchester County employed by Uni-Coat Spray Painting, Inc., a contractor which was party to a collective bargaining agreement with the Painters union.

In Enterprise Association, etc. (The Austin Company), 204 N.L.R.B. No. 118, 83 L.R.R.M. 1396 (1973), now pending on review before the U.S. Court of Appeals for the District of Columbia, the Administrative Law Judge agonized over the difficulty of trying to figure out who the primary employer was. He finally decided that the primary employer was both the manufacturer of units transported to the construction jobsite for installation into a building and the general contractor, two entirely separate and independent business enterprises.

The National Labor Relations Board never solved the riddle. It wrote:

> "In view of our finding that Respondent's actions were undertaken for a secondary objective, we find it unnecessary to pass upon the Administrative Law Judge's finding that Austin and Slant/Fin were the primary employers. Hence, we are not deciding herein whether picketing or other actions brought to bear directly against Austin and Slant/Fin would constitute lawful primary activity." 204 N.L.R.B. No. 118, p.3 ftnt. 1

But where does that leave a union whose collective bargaining agreement has been violated because an employer has refused to comply with a work preservation clause? Where the creator of the rule is not able to apply it, how can a union comply?

And of what advantage is the rule? If the primary employer in the Uni-Coat Spray Painting, Inc.

case were the Cincinnati manufacturer as the General Counsel argued, that would have served to have spread the area of industrial conflict to wherever in the Nation the paint was made or used, rather than to have localized it to one jobsite in Westchester County, New York.

If the general contractors and their agent were the primary employers in the instant case, the Union could picket the very same jobsites and induce the employees of the general contractor to strike. The General Counsel's theory does not have any material effect on interstate commerce; it just reassigns labels to different parties.

But the General Counsel's theory of right of control is of the most serious consequence to employees who believe their wages, hours, and working conditions are protected by collective bargaining agreements. The General Counsel has tried, so far unsuccessfully, to apply the right of control theory not only to what work is done by the employees represented by the union, e.g., National Woodwork Manufacturers Assn v. N.L.R.B., supra, but also to how the work is to be done and to the tools of the trade; e.g., Danielson, etc. v. Painters District Council No. 20, 185 N.L.R.B. 930 (1970).

Under the General Counsel's right of control theory, if a manufacturer, or a builder, or an owner, or a general contractor, or an architect specifies the job conditions, then the sub-contractor with whom the union has a collective bargaining agreement who accepts those job conditions has no control and that sub-contractor thereby ceases to be the primary employer of his own employees. The logical and natural consequence of that theory is that the builder or the general contractor, et al., will include in the bid specifications, perhaps for economic reasons only, that the length of the work day shall be eight hours rather than seven hours before overtime at premium wages shall be paid, or that the wage rate for electricians shall be at some hourly rate lower than the hourly rate set forth in the collective bargaining agreement. Under the General Counsel's theory the employees could not withhold their labor from their own employer even though he paid them less than the collective bargaining rate of pay and required them to work longer than the work day set forth in the collective bargaining agreement, because the specifications of the job as established by the builder, or the general contractor, et al., if accepted by the sub-contractor overrule the collective bargaining agreement. How convenient for an employer to avoid the

provisions of a collective bargaining agreement through the simple expedient of ignoring its terms and entering into another agreement with a third party on the terms of the third party.

It is this simple. The General Counsel is trying to force employees to work not only on the basis of terms and conditions of employment to which they never agreed but which are, moreover, contrary to the very terms and conditions of employment to which they did agree. The General Counsel argues that employees must work under whatever terms and conditions their employer imposes even though such imposition amounts to the unilateral abrogation of the terms of the collective bargaining agreement between that employer and those employees, just so long as the reason for violating the collective bargaining agreement is for the purpose of gaining a business contract. A unilateral change by an employer of the terms and conditions set forth in a collective bargaining agreement is in itself a violation by the employer of the National Labor Relations Act, N.L.R.B. v. Katz, 369 U.S. 736 (1962); N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221 (1963).

Strikes in protest against employer unfair labor practices are protected by the National Labor Relations

Act, N.L.R.B. v. MacKay Radio & Telegraph Co., 304 U.S. 333 (1938).

The foregoing are some of the absurdities which result from the acceptance of the General Counsel's theory.

If persons believe it desirable to extend the prohibitions against strikes to primary employers when they do not have "control", then they should attempt to accomplish that end by legislation amendatory to the Act as it now reads. To try to accomplish that goal in the manner now attempted not only demands of the judiciary that it legislate, it also serves to debase the language and give unnatural and tortured definitions to words that ought to be left to mean what they represent themselves to mean.

CONCLUSION

On the facts of this case all six United States Courts of Appeals which have considered the right of control theory since the Supreme Court's decision in National Woodwork have found the union's conduct to be protected by the National Labor Relations Act. The General Counsel, despite the clear direction of the Supreme Court that the Board must look at "all the surrounding circumstances", still insists on applying the right of control theory in

a per se manner. There is no evidence that Local No. 501 sought any objective in this case but that the employers of its members comply with their collective bargaining agreements vis-a-vis their own employees. Such conduct is clearly lawful and particularly so when the employers actively negotiated away the very work which their collective bargaining agreements preserved for their employees.

The Administrative Law Judge of the National Labor Relations Board found that Local No. 501 had not violated the Act and recommended dismissal of the complaint in this case. In this he seconded the holding of the District Court from which this appeal is taken, such Court writing that "it need not issue an injunction where the Board's entitlement rests on a legal theory which 'the district court is convinced...is wrong' and which is unlikely to be accepted by the Court of Appeals for this Circuit."

The decision of the Court below should be affirmed.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 501, AFL-CIO

and

Case No. 2-CC-1316

ASSOCIATED GENERAL CONTRACTORS OF CONNECTICUT, INC.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 501, AFL-CIO

and

Case No. 2-CC-1317

ASSOCIATED GENERAL CONTRACTORS OF CONNECTICUT, INC.

Raymond P. Green, Esq., for the General Counsel.
Ralph P. Katz, Esq., for the Respondent.
Mr. Frank J. White, for the Charging Party.

DECISION

Statement of the Case

Pursuant to separate timely unfair labor practice charges filed by Associated General Contractors of Connecticut, Inc., the charging party herein, against the Union named in the caption, Respondent herein, a consolidated complaint issued, dated April 30, 1974. The consolidated complaint alleges in substance that Respondent engaged, at two separate construction sites in Stamford, Connecticut, in secondary boycott activity violative of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended. 1/

1/ By letter dated May 30, 1974, a copy of which was served upon all the parties, General Counsel informed the undersigned that the (Continued)

At the hearing conducted before me in New York City on May 21, 1974, the parties stipulated that the evidence in this matter would consist of the record compiled before Judge Jon O. Newman of the United States District Court for the District of Connecticut in an injunction proceeding under Section 10(1) of the Act dealing with the instant controversy. That record was supplemented by brief oral testimony at the instant hearing by one witness. Memoranda on the evidence and the law submitted to Judge Newman were resubmitted as briefs in this case and Respondent, pursuant to permission granted at the instant hearing, submitted a short supplemental brief.

Upon the entire record in this proceeding - virtually all the critical evidence is undisputed - and upon consideration of the arguments advanced and the authorities adduced by the parties, I make the following:

Findings and Conclusions

I. Jurisdiction

Atlas Construction Company, a Connecticut corporation with an office and place of business in Stamford, Connecticut, provides general contracting services in the building and construction industry and during the past year, a representative period, furnished services valued in excess of $50,000 in states other than Connecticut.

During the period here under consideration Atlas was furnishing general contracting services for Stamford Realty and Construction Company which was erecting a plant in Stamford, Connecticut for the Stamford Dressed Beef Company. This project will be referred to herein as the Stamford job. During the same period Atlas was furnishing similar services to Herloy, Inc., which was erecting an office building in Stamford, Connecticut, for an enterprise known as Hilti, Inc. This project will be referred to herein as the Hilti job.

Atlas subcontracted certain of the electrical work on the Stamford job to Peter M. Santella, Inc., herein Santella. Santella in the course of its performance of electrical work furnished services during the past year valued in excess of $500,000; more than $50,000 worth of these services was performed for Atlas.

1/ (Continued) evidence did not substantiate an additional allegation of the complaint that Respondent's conduct also violated Section 8(b)(4)(i)(B) of the Act and, accordingly, moved to withdraw that allegation. That motion is granted. The letter will be marked as Administrative Law Judge's Exhibit 1 and is hereby admitted into the record of this proceeding.

Atlas subcontracted certain of the electrical work on the Hilti job to Rice Electrical Contracting Company, herein Rice. Rice, like Santella, furnished electrical services during the past year valued in excess of $500,000 of which more than $50,000 worth was performed for Atlas.

On the foregoing undisputed facts I find that Atlas, Santella and Rice are employers and persons engaged in commerce within the meaning of Sections 2(1), (2), (6) and (7) and 8(b)(4) of the Act.

Respondent represents the electrical employees of Santella and Rice and has collective bargaining relationships with both enterprises covering those employees. It is undisputed and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

Jurisdiction is properly asserted in this proceeding.

II. The Alleged Unfair Labor Practices

As the evidence establishes and as the parties acknowledge, the resolution of this case turns on the applicability and scope of the Board's so-called "right to control" the work doctrine. In essence, that doctrine is that a union-coerced employer who is powerless to satisfy the union's demands except by bringing pressure on another independent contractor to change a business or labor policy, or alternatively by ceasing to do business with such other contractor, is presumed to be a neutral secondary employer, absent proof to the contrary. The Board elucidated the applicability and scope of this doctrine in Local Union No. 438 and 48, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO and George Koch Sons, Inc., 201 NLRB No. 7, 82 LRRM 1113 (1973), enforced sub nom. George Koch Sons, Inc. v. N.L.R.B., 490 F. 2d 323 (C.A. 4, 1973). Significant in both the Board and court decisions is the proposition that the "right to control" doctrine is not a rigid per se principle, but rather a significant criterion which must be appraised in the light of all the surrounding circumstances.

The relevant evidence is set forth hereunder.

A. The contractual relationship between Respondent and Santella and between Respondent and Rice

It is undisputed that both Santella and Rice, during the period relevant here, operated under a collective bargaining relationship with Respondent for their electrical workers. A critical clause in the collective bargaining agreement covering Santella and Rice, respectively, provided that

> Where wiring systems and equipment are required for lighting, power, heat, etc., during the periods of construction of a building, these systems and equipment shall be installed, maintained and operated by electrical workers.

The legality of this clause, commonly known as a work protection clause, is plain and is not challenged here.

Another contractual provision in the collective bargaining agreement covering Santella and Rice and relevant here provided that

> Members of the Union /Respondent/ shall not work for any employers except those who comply with the working rules later stated in this agreement.

The clause first quoted is one of the "working rules."

B. The Stamford job

As noted, Atlas performed the general contracting services for the construction of a plant for the Stamford Dressed Beef Company. In the discharge of this function Atlas, as agent for Stamford Realty, subcontracted the performance of the electrical work for this job to Santella. In negotiating for this subcontract, Atlas sought and obtained a provision that Santella was not to be responsible for or assigned any work in relation to maintaining temporary electrical power at the construction site. Temporary power is utilized on construction sites and involves the use of a switch box through which electricity can be turned on and off during the various stages of construction. Atlas, which does not employ electricians, retained this work for itself. Santella, notwithstanding its contractual commitment to Respondent previously quoted herein, accepted the electrical subcontract with this exclusion.

Construction at the site began in 1973. Santella commenced performance under its subcontract in early March 1974 and continued to work until March 27, 1974. On or about that date Respondent notified Santella that the latter was in violation of their collective bargaining agreement because it had no electricians to operate the temporary power. As a result Santella ordered its employees to cease work at the job site. Atlas protested Santella's failure to complete its work under the subcontract and negotiations ensued between Atlas, Santella and Respondent to compromise their differences. Respondent reiterated to Santella that the employees it represented would not work on the job site so long as Santella, in breach of their collective bargaining agreement, did not perform the temporary power work. Atlas, on the other hand, rejected suggestions by Santella that that function be assigned to Santella's employees. Eventually, however, a compromise was reached after Santella agreed to employ an electrician represented by Respondent to remain on the site as long as the temporary power was on. Santella's employees then returned to work at the job site.

C. The Hilti job

The situation at the Hilti job was largely parallel to that at the Stamford job. Rice, the electrical subcontractor, was bound to the same collective bargaining provisions, previously quoted, as Santella. And like Santella, Rice, in disregard of these provisions, accepted an electrical subcontract which did not include the maintenance or operation of temporary power, a function retained by Atlas. The Hilti job also began in 1973 and Rice commenced its electrical work on that job in mid-March 1974. Rice continued to work until April 5, 1974. On the latter date Respondent told Rice that Rice was in breach of its collective bargaining agreement because it had not assigned electricians for the temporary power operation. Respondent told Rice, further, that unless Rice remedied this situation, Respondent would pull the employees it represented off the job. As a result, Rice discontinued its work on the Hilti job. Rice later returned to continue its work under a purely tentative arrangement but the basic dispute was not and has not been adjusted.

D. Analysis and concluding findings

There is no question in view of the foregoing evidence that Respondent, by invoking its contract with Santella and Rice respectively and by informing both entities that the employees Respondent represented would not work at the respective sites so long as all of the electrical work was not being performed by them, exerted coercive pressure upon Santella and Rice and caused a cessation of business relationships at the Stamford and Hilti jobs. General Counsel contends that this action constituted a secondary boycott in that Santella and Rice, although the direct employers of the employees involved, were in fact secondary employers or neutrals in the dispute. General Counsel predicates this contention on its view of the "right to control" the work doctrine. Specifically, General Counsel argues that inasmuch as Santella and Rice were not assigned the maintenance and operation of temporary power in the first instance under their respective subcontracts, the right to assign that work to their electricians was beyond their control. The real target of Respondent's action, according to General Counsel, had to be Atlas which withheld the disputed work from Santella and Rice in the first instance. Accordingly, Atlas was the primary employer and Santella and Rice were neutrals. It follows, General Counsel contends, that Respondent by exerting coercive pressure against Santella and Rice engaged in a secondary boycott within the meaning of Section 8(b)(4)(ii)(B) of the Act.

Respondent, on the other hand, contends that it has a primary dispute with Santella and Rice, respectively; that both enterprises violated their collective bargaining agreement with Respondent and that Respondent invoked its right, explicitly set forth in the agreement, not to work for an employer who failed to comply with the established working rules. As General Counsel conceded in his Memorandum to the District Court, "/i/f Santella and Rice are primary employers with whom the union has a primary dispute then the union would not have violated Section 8(b)(4)(B) of the Act."

As noted, a critical touchstone for resolving this primary-secondary conflict is the "right to control" doctrine. Extended discussion of the validity of this doctrine here would be superfluous because it has been abundantly-perhaps over-abundantly - analyzed and dissected in a long series of decisions by the Board and the courts, quite frequently with contrary results on the same set of facts. Many of the decisions, including the decision in National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612 (1967), are cited in the Board and court decisions in the Koch case cited at the outset of this section of this Decision. Reference to those decisions will demonstrate the litigational history of the "right to control" doctrine and obviate the need for tedious recapitulation here.

For present purposes it would appear to suffice to make reference to the Board's decision in the Koch case, affirmed by the Court of Appeals in the Fourth Circuit, where the Board made a detailed exposition of its "right to control" doctrine and the limitations to that doctrine. There, the Board repudiated the notion that it "looked solely at the pressured employer's 'contract right to control' the work at issue at the time of the pressure to determine whether the pressure was primary or secondary." Rather, the Board said, it

> has always proceeded with an analysis of (1) whether under all the surrounding circumstances the union's objective was work preservation and then (2) whether the pressures were directed at the right person, i.e., at the primary in the dispute.

Explicating its position further, the Board said

> in addition to determining under all the surrounding circumstances, whether the union's objective is truly work preservation, we have studied and shall continue to study not only the situation the pressured employer finds himself in but also how he came to be in that situation. And if we find that the employer is not truly an "unoffending employer" /footnote omitted/, who merits the Act's protections we shall find no violations in a union's pressures such as occurred here, even though a purely mechanical or surface look at the case might present the appearance of a parallel situation. /Footnote omitted/

The Fourth Circuit adopted and affirmed the Board's view that "the Board has not exalted right to control as per se the conclusive indicium of a secondary boycott." The Court explained further:

> Admittedly, an employer should not have an unfettered license to contract out work and, as a result, acquire a shield from union collective bargaining agreements. Certainly where the employer was initially in a position to accede to potential union demands through the negotiating stages of the contract, then he should not later be deemed a neutral if he intentionally forfeited his potential for control.

Applying the foregoing principles in the Koch case, the Board found, and the court agreed, that the pressured employer there, Phillips, although the direct employer of the employees involved, was nonetheless a neutral and concluded that a proscribed secondary boycott had taken place. However, the Board's decision was based on the "surrounding circumstances," labelled "extraordinary" by the court. Thus, it appeared in Koch that the prime contractor, Koch, who subcontracted the work to Phillips, the pressured employer, had no authority in the first instance to award the disputed work (pipe fabrication) to Phillips. Because Koch had no such authority in the first instance, Phillips had no bargaining power with respect to that work. Accordingly, the Board held (201 NLRB No. 7):

> Thus, although the /union's/ claim of work preservation was indeed valid Phillips by its contract with Koch had no power to give the /union/ the work /it/ sought, since such work was never Phillips' to award in the first place. And as Phillips had no past, present, or future authority to award this work to the /union/, /its/ actions here must have been undertaken to produce their effects elsewhere. /Footnote omitted./ Therefore, since the pressure directed at Phillips was undertaken for its effects elsewhere /footnote omitted/, such activity was secondary, even though Phillips was the immediate employer here.

The court made a like analysis (490 F. 2d 323):

> But the circumstances now presented show that G.E. required Koch to pretest the pipe at the latter's location in Indiana - thus away from the jobsite - and for this purpose the pipe had first to be fabricated. Since Koch was inextricably tied to this schedule, Phillips had no bargaining power with respect to this work. Consequently, Phillips did not surrender its right-to-control, for it never had any.

The situation in the instant case is wholly and sharply distinguishable. Unlike Koch, Atlas was not bound in any way to withhold

any of the electrical work from Santella or Rice. The record here demonstrates that Atlas had full authority to grant all or part of the electrical work at both sites and Santella and Rice had full bargaining power with respect to that work. Under the circumstances it is plain that Santella and Rice, in effect, voluntarily surrendered their right to control when they negotiated away the work which they had earlier agreed in their collective bargaining agreement to preserve for their employees. Respondent's statement that it would withhold the services of the employees of Santella and Rice, because of their voluntary abandonment of their contractual commitment to Respondent, was a further exercise of a contractual commitment not to work where there was a violation by the employer party to the agreement of an established working rule.

Here, Santella and Rice cannot be regarded as "unoffending employers" who merit the Act's protections and, as the Board noted in Koch, it will "find no violations in a union's pressures such as occurred here" based on "a purely mechanical or surface look at the case." And as the Fourth Circuit said in like vein, "where the employer was initially in a position to accede to potential union demands through the negotiating stages of the contract, then he should not later be deemed a neutral if he intentionally forfeited his potential for control."

Here Santella and Rice had the potential for control. By their voluntary action they forfeited that potential. Significant here, as the Board holds, is not only the situation Santella and Rice as pressured employers found themselves in but how they came to be in that situation. The surrounding circumstances here, unlike those in Koch, would justify a finding of a proscribed secondary boycott only by a naked and mechanical application of the "right to control" the work doctrine.

Accordingly, I find that in the instant case Santella and Rice were primary employers and that the pressures directed against them by Respondent were directed against them as primary employers. In such a frame of reference the familiar circumstance that Respondent's primary action also had secondary effects does not convert legal conduct into proscribed activity.

Conclusion of Law

International Brotherhood of Electrical Workers, Local Union No. 501, AFL-CIO, the Respondent herein, has not violated Section 8(b)(4)(B) of the Act, as alleged in the complaint.

Upon the foregoing findings of fact, conclusion of law, upon the entire record, and pursuant to Section 10(c) of the Act, I recommend the following:

ORDER 2/

The complaint in this proceeding is dismissed in its entirety.

Dated at Washington, D.C. JUN 27 1974 .

Arnold Ordman
Administrative Law Judge

2/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed wavied for all purposes.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Preston Anderson, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 980 Simpson St Bronx NY.

That on the 16 day of Oct, 1974, deponent personally served the within Brief for Respondent Appellee upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

Marvin Roth
Deputy Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Ave NW
Washington, D.C. 20570

Preston Anderson

Sworn to before me this
16 day of Oct, 1974

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County 75
Commission Expires March 30, 1976

Received 3 copies of the within

this ___ day of _____, 19___.

Sign _____

For: _____ Esq(s).

Att'ys for _____